

THE HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,

vs.

MOTOROLA, INC., et al.,
Defendants.

MOTOROLA MOBILITY, INC., et al.,
Plaintiffs,

vs.

MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

**MICROSOFT'S RESPONSE TO
MOTOROLA'S MOTION TO FILE
DOCUMENTS UNDER SEAL IN
SUPPORT OF ITS OPPOSITION TO
MICROSOFT'S RULE 702 MOTION
TO PRECLUDE TESTIMONY BY
CHARLES R. DONOHUE AND DR.
R. SUKUMAR (ECF NO. 402)**

NOTED: September 14, 2012

I. INTRODUCTION

Microsoft does not oppose Motorola Mobility and General Instrument's September 5, 2012 Motion to File Documents Under Seal in Support of its Opposition to Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohue and Dr. R. Sukumar (ECF No. 402). As described in Motorola's Motion, the following documents were filed under seal:

MICROSOFT'S RESPONSE TO MOTOROLA'S
9-5-12 MOTION TO SEAL (ECF NO. 402) - 1

LAW OFFICES
CALFO HARRIGAN LEYH & EAKES LLP
999 THIRD AVENUE, SUITE 4400
SEATTLE, WASHINGTON 98104
TEL. (206) 623-1700 FAX. (206) 623-8717

1. Motorola Mobility's and General Instrument's Opposition to Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohue and Dr. R. Sukumar (Motorola's "Opposition"); and
2. Exhibits 35-39, 44, 46, 48, 50, 58, and 63-64 to the Second Declaration of Samuel L. Brenner in support thereof ("Second Brenner Declaration").

Motorola argues that all of these exhibits with the exception of Exhibit 48 contain Confidential Business Information relating to the Parties' licensing and business practices, the disclosure of which could lead to competitive harm. Microsoft agrees that these documents should remain under seal. Likewise, Microsoft agrees that an unredacted version of Motorola's Opposition should remain under seal.

Motorola states that Exhibit 48, the transcript from the deposition of one of its experts, Ramamirtham Sukumar, does not contain Confidential Business Information, despite the fact that it was originally designated as Confidential by Motorola. Microsoft agrees. Exhibit 48 need not remain under seal.

II. AUTHORITY

A. The Operative Protective Order and Applicable Court Rules Permit and Require Microsoft to File Confidential Information under Seal.

Pursuant to the Protective Order issued by the Court on July 21, 2011, the parties are required to file materials designated by the parties or non-parties as containing Confidential Business Information¹ under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business

¹ "Confidential Business Information" is defined in the parties' Protective Order as "information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1.

Information shall be so designated by such supplier in writing...and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: “[SUPPLIER’S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in support of a non-dispositive motion upon a showing of good cause. While the public generally enjoys a right to inspect and copy public records, “it is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper purpose” is where the commercial business information at issue is sought to be used as a “source[] of business information that

1 might harm a litigant's competitive standing." *Id.* (denying access to copies of tapes played at
 2 trial and noting that courts refused public access to their files where granting such access might
 3 "become a vehicle for improper purposes," including causing a litigant competitive harm).
 4 Good cause exists to maintain under seal all of the above-referenced documents other than
 5 Exhibit 48.

6 **B. Good Cause Exists for Maintaining The Above-Referenced Documents (Other**
 7 **than Exhibit 48) Under Seal.**

8 1. Exhibits 35-36, 38-39, 46, 50, 58, and 63-64 Should Remain Under Seal.

9 Motorola argues that Exhibits 35-36, 38-39, 46, 50, 58, and 63-64 to the Second
 10 Brenner Declaration contain highly confidential information relating to the Parties' business
 11 and/or licensing practices, the disclosure of which to third parties could potentially lead to
 12 competitive harm. Microsoft agrees that these exhibits should be maintained under seal, for
 13 the reasons expressed by Motorola in its motion. Motorola's motion should be granted with
 14 respect to those exhibits.²

15 2. Exhibit 44 Should Remain Under Seal.

16 Exhibit 44 is a copy of an internal October 7, 2011 Motorola email, which Motorola
 17 asserts contains highly confidential business information relating to the licensing practices and
 18 history of both Motorola and a non-party to this litigation. Microsoft takes no position with
 19 respect to the confidentiality of the information contained in the referenced email. However,
 20 for the purposes of this motion, Microsoft does not dispute that it should remain sealed.

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 23 ² By its 9/5/12 Motion to Seal (ECF No. 401), Microsoft previously sought to file the transcript from the
 24 deposition of one of its experts, Timothy Simcoe, under seal. The Court has not yet ruled on that motion.
 25 Motorola has filed it under seal (as Exhibit 37) in connection with this motion. Microsoft incorporates by this
 reference the arguments it made in its 9/5/12 motion. The transcript contains testimony relating to the parties'
 non-public business and licensing practices. Good cause exists to maintain the transcript under seal.

1 **C. Exhibit 48 May Be Unsealed.**

2 Motorola filed Exhibit 48 under seal. Exhibit 48 is the transcript from the deposition of
 3 one of Motorola's experts, Ramamirtham Sukumar. Motorola states at page 5 of its Motion
 4 that it does not believe the transcript contains any confidential business information. Microsoft
 5 agrees. The transcript was also filed publicly, by agreement of the Parties, as Exhibit 8 to the
 6 Second Declaration of Christopher Wion in Support of Microsoft's Rule 702 Motion (*see* ECF
 7 No. 424). The transcript need not remain under seal.

8 **III. CONCLUSION**

9 For these reasons, Microsoft respectfully requests that Exhibits 35-36, 38-39, 44, 46,
 10 50, 58, and 63-64 to the Second Brenner Declaration, and any references to these exhibits in
 11 Motorola's Opposition (ECF Nos. 403 & 409), remain under seal. The seal can be lifted on
 12 Exhibit 48 (the Sukumar deposition transcript).

13 Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's
 14 designation of material as Confidential in accordance with the terms of the Protective Order.
 15 Microsoft expressly reserves the right to do so as the circumstances warrant.

16 DATED this 12th day of September, 2012.

17 CALFO HARRIGAN LEYH & EAKES LLP

18 By s/ Arthur W. Harrigan, Jr.
 19 Arthur W. Harrigan, Jr., WSBA #1751
 20 Christopher Wion, WSBA #33207
 21 Shane P. Cramer, WSBA #35099

22 By s/ T. Andrew Culbert
 23 T. Andrew Culbert
 24 David E. Killough
 25 MICROSOFT CORPORATION
 1 Microsoft Way
 Redmond, WA 98052
 Phone: 425-882-8080
 Fax: 425-869-1327

1 David T. Pritikin
2 Richard A. Cederoth
3 Constantine L. Trela, Jr.
4 William H. Baumgartner, Jr.
5 Ellen S. Robbins
6 Douglas I. Lewis
7 David C. Giardina
8 John W. McBride
9 David Greenfield

10
11
12
13
14
15
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17
18
19
20
21
22
23
24
25
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Phone: 312-853-7000
Fax: 312-853-7036

Carter G. Phillips
Brian R. Nester

SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
Telephone: 202-736-8000
Fax: 202-736-8711
Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 12th day of September, 2012, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

Ralph Palumbo, WSBA #04751
Philip S. McCune, WSBA #21081
Lynn M. Engel, WSBA #21934
Summit Law Group
315 Fifth Ave. South, Suite 1000
Seattle, WA 98104-2682
Telephone: 206-676-7000
Email: Summit1823@summitlaw.com

_____ Messenger
_____ US Mail
_____ Facsimile
 X ECF

Steven Pepe (*pro hac vice*)
Jesse J. Jenner (*pro hac vice*)
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9046
Email: steven.pepe@ropesgray.com
Email: jesse.jenner@ropesgray.com

_____ Messenger
_____ US Mail
_____ Facsimile
 X ECF

Norman H. Beamer (*pro hac vice*)
Ropes & Gray LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: (650) 617-4030
Email: norman.beamer@ropesgray.com

_____ Messenger
_____ US Mail
_____ Facsimile
 X ECF

1 Paul M. Schoenhard (*pro hac vice*)
2 Ropes & Gray LLP
3 One Metro Center
4 700 12th Street NW, Suite 900
5 Washington, DC 20005-3948
6 Telephone: (202) 508-4693
7 Email: Paul.schoenhard@ropesgray.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

8 DATED this 12th day of September, 2012.

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s/ Linda Bledsoe
LINDA BLEDSOE